



Comptroller General
of the United States

Washington, D.C. 20548

Decision

REDACTED VERSION

Matter of: Motorola, Inc.

File: B-247937.2

Date: September 9, 1992

James A. Dobkin, Esq., and Justin M. Dempsey, Esq., Arnold & Porter, for the protester.

R. Jerry Crawford, Esq., Rockwell International, Collins International Service Company; Joel R. Feidelman, Esq., and James M. Weitzel, Jr., Esq., Fried, Frank, Harris, Shriver & Jacobson; and William K. Dix, Esq., Science Applications International Corporation, interested parties.

Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly may exclude a proposal from the competitive range where the proposal enjoys no significant technical advantage over the remaining proposals, and its cost/price after discussions exceeds the low offeror's by 56.7 percent and the second low offeror's by 21.8 percent, with no reasonable chance that significant cost reduction would be achieved if further discussions were held.

DECISION

Motorola, Inc. protests the exclusion of its proposal from the competitive range under request for proposals No. F41621-91-R-5005, issued by the Department of the Air Force for the development of the Air Force Electronic Key Distribution System. Motorola contends that the decision to exclude its proposal from the competitive range was unreasonable.

We deny the protest.

*The decision was issued on September 17, 1992, and contained proprietary and source-selection sensitive information. It was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

BACKGROUND

The Air Force Electronic Key Distribution System (AFEKDS) is being developed to provide for accurate, reliable, timely and secure management and distribution of communications security material; it automates the distribution of key information--usually a sequence of random or pseudo-random binary digits--used in the encryption and decryption of electronic signals and for producing other keys or determining electronic counter-countermeasure patterns. The solicitation requested proposals for a 5-year contract--including a base year and 4 option years, with the last 2 option years limited to maintenance only--to design, develop, integrate, deliver, install and test the initial tier of the AFEKDS. The solicitation specifically instructed offerors to establish various labor categories, to apportion 750,000 manhours for the development effort and 22,000 manhours per maintenance option year over the labor categories, and to price the effort based upon a mix of firm-fixed-price and cost-plus-incentive fee task orders for the development and labor hour rates for the maintenance efforts.

The solicitation provided for award to be made to the responsible offeror submitting the proposal considered most advantageous to the government based upon technical and cost evaluation factors. The RFP provided for technical proposals to be evaluated based upon evaluation factors for past performance, methodology and program management; past performance was twice as important as methodology or program management, and the latter two factors were of equal importance. The solicitation generally stated that the agency would evaluate the realism, completeness, and reasonableness of proposed costs, and specifically provided for verification of labor, overhead, and general and administrative rates, and the cost of money factor. The solicitation stated that cost would be of "considerably less importance than the technical portion of the proposal, and is not expected to be the controlling factor in the selection process." The solicitation also stated, however, that the importance of cost "could become greater depending upon the quality of the proposals" and "might be the deciding factor for the selection" if two or more technical proposals were determined to be "substantially equal."

The Air Force received five proposals in response to the solicitation, including Motorola's; the agency determined all offers to be within the initial competitive range. The Air Force then conducted written and oral discussions with the offerors and requested revised proposals. Based upon the evaluation of the revised proposals, the agency included the offers of two firms--Science Applications International Corporation (SAIC) and Rockwell International, Collins

International Service Company--in a revised competitive range, but excluded the proposals of Motorola and two other firms.

In determining to exclude Motorola's proposal from the competitive range, the Air Force took into consideration the fact that, as indicated below, Motorola's proposal received a lower technical rating and offered a higher cost than did SAIC's or Rockwell's:

	<u>Past Performance</u> (Rank)	<u>Methodology</u> (Rank)	<u>Program Management</u> (Rank)	<u>Cost/Price</u>
SAIC	Marginal/ Moderate Risk (1)	Acceptable/ Moderate Risk (2)	Acceptable/ Low Risk (1)	\$32,351,069
Rockwell	Marginal/ Moderate Risk (1)	Acceptable/ Low Risk (1)	Acceptable/ Low Risk (1)	\$41,626,410
Motorola	Marginal/ Moderate Risk (1)	Acceptable/ Moderate Risk (2)	Marginal/ Moderate Risk (5)	\$50,682,913

Agency evaluators found Motorola's, SAIC's and Rockwell's past performance as described in their proposals to be marginal, and to generally pose a moderate risk with respect to schedule and performance. With respect to Motorola and Rockwell, the agency also found that their past performance indicated a moderate risk of an increase in cost under this procurement. Agency evaluators specifically concluded that Motorola had failed to comply with the solicitation instructions to describe in detail the contracts it listed in its proposal. Further, according to the evaluators, to the extent that Motorola's experience under the contracts was described, the experience did not appear to be relevant to the work required under the current solicitation.

Although all three proposals were determined acceptable under the methodology factor, SAIC's and Motorola's were found to pose a moderate risk in this area. Agency evaluators specifically concluded that (1) there existed a moderate risk Motorola would be unable to meet the required schedule because of expected delays resulting from the fact that Motorola and its principal subcontractor had proposed different, incompatible configuration management software, and (2) because the proposal failed to discuss a methodology for integrity testing and reliability testing of software,

there was a moderate risk of inadequate predelivery testing, resulting in possible deficiencies and an increase in maintenance cost. Further, while SAIC's and Rockwell's proposals were rated acceptable/low risk under the program management factor, Motorola's proposal was found to be marginal in this area. Agency evaluators concluded that Motorola's proposal failed to adequately explain the relationship between the program manager, project leader and subcontractor administrator, and that this posed a moderate risk to performance and schedule, in part because Motorola intended to subcontract 65.5 percent of the total effort.

Based upon its lower technical rating and substantially higher cost/price, Motorola's proposal was found to lack a reasonable chance for award and was eliminated from the competitive range for this reason. The Air Force has withheld award pending our decision on the protest.

COMPETITIVE RANGE DETERMINATION

Motorola argues that the technical and cost/price evaluations do not furnish a basis for excluding its proposal from the competitive range. With respect to the technical evaluation, Motorola points out that the Air Force has conceded that there were no significant differences among the three proposals with respect to past performance, the most important technical evaluation factor, which would furnish the basis for discriminating among the offerors.

In addition, Motorola argues that its evaluation under the less important methodology and program management factors likewise did not furnish a basis for excluding its proposal from the competitive range. With respect to methodology, Motorola notes that it received the same rating--acceptable/moderate risk--as did SAIC. With respect to program management, Motorola notes that the agency's concern with Motorola's failure to adequately describe the relationship between the program manager, project manager and subcontract administrator gave rise to the issuance during discussions of only a clarification request, and not a deficiency notice; according to the protester, "a CR [clarification request] is simply too minor a basis on which to eliminate an offeror from the competitive range." Motorola further argues that "even if Motorola's response to that clarification request . . . did not address all of the Air Force's concerns," the overall importance to be accorded those concerns must be weighed against (1) the evaluators' conclusion under the most important program management subfactor--program planning--that Motorola's approach to quality assurance for both its and its subcontractor's effort was adequately described, and (2) their conclusion under the second most important subfactor--selection of key personnel--that Motorola had proposed "an exceptionally

strong group of key personnel who have the experience and education necessary to accomplish the AFEKDS project."

In any case, Motorola notes that the agency's Proposal Evaluation Guide states that "to receive consideration for award, a rating of no less than . . . (marginal) must be achieved" in each area. The protester interprets this provision to require the inclusion in the competitive range of any proposal receiving at least a marginal rating under each technical evaluation factor.

The competitive range consists of all proposals that have a reasonable chance of being selected for award, generally including proposals that are technically acceptable or reasonably susceptible of being made acceptable through discussions. Kranco, Inc., B-242579, May 1, 1991, 91-1 CPD ¶ 425. However, a technically acceptable proposal may be excluded from the competitive range if, based upon the array of technical ratings actually obtained by the offerors and consideration of the proposed costs, the proposal does not stand a real chance of being selected for award. The Cadmus Group, Inc., B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271. Indeed, cost or price not only is a proper factor for consideration, see Everpure, Inc., B-226395.2; B-226395.3, Sept. 20, 1988, 88-2 CPD ¶ 264, but may emerge as the dominant factor in determining whether proposals fall within the competitive range. See Kranco, Inc., supra; Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114; Communication Mfg. Co., B-215978, Nov. 5, 1984, 84-2 CPD ¶ 497. We will not disturb a determination to exclude an offeror from the competitive range unless the record indicates that the determination was unreasonable. Kranco, Inc., supra.

We find that the Air Force's exclusion of Motorola's proposal from the competitive range was reasonable. Even if Motorola's interpretation of the Guide is correct, the Guide is simply internal agency guidance and does not give outside parties any rights. Mandex, Inc.; Tero Tek Int'l, Inc., B-241759 et al., Mar. 5, 1991, 91-1 CPD ¶ 244. The appropriate inquiry is whether the agency adhered to law and regulation by evaluating proposals in accordance with the evaluation scheme set forth in the RFP and by including in the competitive range those offers with a reasonable chance for award. Id. Nothing in applicable law or regulation or in the RFP itself precluded the Air Force from excluding a technically acceptable but otherwise noncompetitive offer from the competitive range.

Although Motorola questions the significance of the perceived weaknesses in its technical proposal, it does not dispute that its proposal included the identified weaknesses. Specifically, Motorola has not established that

the agency was unreasonable in concluding that Motorola's failure to adequately describe the lines of authority in its proposed organization and its approach to subcontract administration, after having been advised of the agency's concern in this area, was a weakness, especially since it proposed to subcontract 65 percent of the total effort. Nor has it established that the agency was unreasonable in finding that Motorola's proposal of different, incompatible configuration management software for it and its principal subcontractor posed a moderate risk to the schedule and that there was a moderate risk arising from Motorola's failure to describe a testing methodology sufficient to assure adequate predelivery testing.

While these weaknesses in its technical proposal, by themselves, may not have justified Motorola's exclusion from the competitive range, the fact remains that the cost/price of Motorola's proposal was significantly higher than the cost/price of either SAIC's or Rockwell's proposal; the cost/price of Motorola's revised proposal exceeded SAIC's cost/price by at least \$18,331,844, or 56.7 percent, and Rockwell's by at least \$9,056,503, or 21.8 percent. Again, cost or price may emerge as the dominant factor in determining whether proposals fall within the competitive range; we have specifically found reasonable an agency's exclusion of a proposal from the competitive range, resulting in a competitive range of one, where the proposal enjoyed no significant technical advantage over the other proposal and its evaluated cost was 30 percent higher with no reasonable chance that significant cost reductions would be achieved if discussions were held. System Integrated, supra.²

Here, the Air Force essentially concluded that there was no reasonable chance that Motorola would eliminate the

¹The disparity between Motorola's cost/price and SAIC's and Rockwell's may have been greater, since agency cost evaluators concluded that Motorola's cost/price may have been understated by approximately \$2.9 million.

²Motorola contends that a higher evaluated cost is an improper basis to exclude a proposal where, as here, the solicitation provides that "cost will be of considerably less importance" than technical factors. However, the fact that, as here, evaluation criteria under a solicitation contemplating award of a cost-type contract place greater emphasis on technical factors than on cost does not eliminate the agency's right to consider cost in determining the competitive range. See 10 U.S.C. § 2305(b)(4)(B) (1988); Systems Integrated, supra; Tracor Marine, Inc., B-222484, Aug. 5, 1986, 86-2 CPD ¶ 150.

significant cost/price advantage offered by SAIC's and Rockwell's proposals. Motorola had been advised to reexamine its principal subcontractor's direct and indirect rates where they exceeded those recommended by Defense Contract Audit Agency (DCAA). Motorola had reduced its proposed cost/price to \$50,682,913 from \$60,988,766 in its initial proposal, in part by increasing the portion of the effort that would be performed by its lower cost subcontractors from 51 to 65.5 percent. Nevertheless, Motorola's overall cost/price remained significantly higher, in significant part because the average overhead rates proposed by Motorola for its share of the work, which were generally consistent with those recommended by the DCAA based upon Motorola's cost experience, exceeded SAIC's and Rockwell's by up to approximately [deleted] percent for the smaller fixed-price portion of the effort and [deleted] percent for the larger cost portion. Further, Motorola's direct labor rates also generally reflected those previously agreed upon between Motorola and DCAA for 1991, with the addition of several percent for escalation. Since the total number of labor hours had been specified by the agency, and no other avenue for significant cost reduction remained unexplored, the agency essentially determined there was no reasonable possibility that Motorola would be able to make the further significant cost/price reduction, of up to 40 percent, required in order to eliminate SAIC's cost/price advantage.

Although the Air Force conducted discussions with Motorola concerning some elements of its cost proposal--e.g., advising Motorola that its principal subcontractor's direct and indirect rates were too high--Motorola questions the Air Force's failure to advise it that its overall cost/price was excessive. Motorola claims that had it been informed that its cost/price was excessive, it "may well have significantly reduced its price" in its best and final offer.

An agency generally must point out weaknesses, excesses or deficiencies in a proposal in order to satisfy the statutory mandate for meaningful discussions with offerors in the competitive range; discussions cannot be meaningful if an offeror is not apprised that its cost exceeds what the agency believes to be reasonable. Mikalix & Co., B-241376.3, June 5, 1991, 91-1 CPD ¶ 527. However, an agency may not inform an offeror of the cost or price that it must meet in order to obtain further consideration or advise it of its relative price standing. Federal Acquisition Regulation (FAR) § 15.610(e)(2). Again, the agency specified the number of hours upon which offerors were to base their offers, and the proposed direct and indirect rates were verified with DCAA. Motorola's higher cost/price reflected a [deleted]; with the exception of

certain of its principal subcontractor's rates which were pointed out to Motorola during discussions, its overall cost/price was not considered by the agency to be unreasonable. Consequently, although Motorola's cost/price exceeded the government estimate of \$36,995,000 (as adjusted to reflect the decreased scope of work called for under the solicitation), the Air Force was not required to advise Motorola that its cost/price was excessive, and, as indicated above, was not permitted to advise Motorola of its standing relative to other offerors. See GeoMet Data Servs., Inc., 71 Comp. Gen. 302 (1992), 92-1 CPD ¶ 259. In any case, Motorola has not indicated with any definiteness or specificity that it would have reduced its cost/price by an amount sufficient to offset either Rockwell's or SAIC's cost/price advantage. See Latin American, Inc., B-247674, June 15, 1992, 92-1 CPD ¶ 519 (prejudice is an essential element of a viable protest, and where no prejudice is shown or is otherwise evident, our Office will not sustain a protest, even if a deficiency in the procurement is evident); see United Int'l Eng'g, Inc. et al., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122.

Motorola argues that the Air Force's evaluation of the realism of SAIC's and Rockwell's proposed costs was superficial and inadequate, but it has failed to identify any specific costs it believes were understated. Id. In any case, while an agency intending to award a cost-reimbursement contract should determine the extent to which offerors' estimated costs represent what the contract should cost, the agency is not required to conduct an in-depth analysis or to verify each item in conducting a cost realism analysis. PRC/VSE Assocs. Joint Venture, B-240160, Oct. 30, 1990, 90-2 CPD ¶ 348. Here, Air Force technical personnel reviewed the proposed labor hours by phase and labor category and determined them to be reasonable, and agency cost evaluators verified with DCAA proposed direct and indirect rates and obtained DCAA audits of the offerors and their subcontractors. In addition, the number of hours on which offerors were to base their proposals had been specified by the agency. In these circumstances, we find no basis for concluding that SAIC or Rockwell significantly understated their costs or that the evaluation of their cost proposals was otherwise unreasonable.

In sum, the record establishes that Motorola's proposal possessed no significant technical advantages relative to Rockwell and SAIC, and its cost/price was significantly higher than Rockwell's or SAIC's with no reasonable chance that cost reductions sufficient to offset their advantages would be obtained through further discussions. We therefore ,

find that the agency reasonably excluded Motorola's proposal from the competitive range.

AGENCY DISCLOSURE OF INFORMATION

Motorola complains that in responding to its protest, the Air Force improperly disclosed information which was procurement sensitive and proprietary to Motorola. In this regard, it appears from the record that the agency inadvertently furnished in-house counsel for Rockwell (who was not admitted to the protective order issued by our Office in this case) with unredacted versions of the source selection plan and proposal evaluation guide, and with a contracting officer's statement of facts which included Motorola's bottom-line cost/price and the proportion of Motorola's contract effort to be subcontracted. According to Motorola, these disclosures require cancellation of the solicitation and resolicitation.

We disagree. Although the disclosure to unauthorized persons during the conduct of a federal procurement of proprietary or source selection information is improper, 41 U.S.C. § 423(d) (1988 and Supp. II 1990); see FAR § 15.413, even where a deficiency in the procurement process may have arguably occurred, competitive prejudice is an essential element of a viable protest; where no prejudice is shown or is otherwise evident from the record, our Office will not sustain a protest. See Anament Labs, Inc., B-241002, Jan. 14, 1991, 91-1 CPD ¶ 31. As discussed above, we find that the Motorola proposal was reasonably excluded from the competitive range. Accordingly, the disclosure during the protest process of such information as its overall cost/price and the proportion of the contract effort to be subcontracted, both highly specific to the procurement at issue, did not prejudice Motorola.

The protest is denied.

James F. Hinchman
General Counsel